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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OWEN ADAMS,

Defendant and Appellant.

A139805

(Humboldt County
Super. Ct. No. CR1204251)

Owen Adams entered a no contest plea to one count of continuous sexual abuse of a minor under 14 years old, for which he was sentenced to eight years in prison. His appeal challenges only the imposition of a restitution fine and a criminal justice administration fee, or “booking fee.” The trial court used the wrong multiplier when it calculated the restitution fee, so we order the amount of the fee corrected. We further hold Adams forfeited his challenge to the booking fee and reject his claim of ineffective assistance of counsel.

BACKGROUND

The stipulated factual basis for Adams’ plea was that “in the County of Humboldt, between the dates of January 1st, 2003, and December 31st, 2007, [Adams] did have lewd conduct with his minor daughter, between the ages of four and seven, that conduct consisting of rubbing her vaginal area, both over her clothes and under her clothes. . . . [T]his happened on more than one occasion.”

Adams was sentenced to the aggravated eight-year term, consecutive to an eight to ten-year prison term he was then serving in Nebraska for the sexual assault of two other

children. Among other fines and fees, the court imposed a restitution fine of \$2,240 and a booking fee of \$196.33. Adams did not object to either, but filed this timely appeal from the judgment.

DISCUSSION

I. Restitution Fine

Adams asserts, and the People concede, that the court used the wrong statutory multiplier to calculate the amount of the restitution fine imposed under Penal Code section 1202.4.¹ They are correct. The relevant portion of section 1202.4, subdivision (b) provides that the restitution fine “(1) . . . shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000). . . . [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.”

Here, the \$2,240 fine recommended by probation and imposed by the court is the product of multiplying the \$280 statutory minimum fine in effect at the time of Adams’ sentencing by his eight-year term. The problem is that the multiplier in effect at the time of Adams’ offense was \$200, not \$280. (See former § 1202.4, subd. (b)(1)[Stats. 2008, ch. 468, § 1].) Because restitution fines constitute punishment, the use of the later-enacted statutory multiplier violates the constitutional rule against ex post facto legislation. (*People v. Souza* (2012) 54 Cal.4th 90, 143; *People v. Zito* (1992) 8 Cal.App.4th 736, 740–741.)

The People propose that we modify the judgment to reflect the restitution fine amount arrived at by using the \$200 multiplier in effect at the time of Adams’ crime, for

¹Unless otherwise indicated, further statutory citations are to the Penal Code.

a total fine of \$1,600. Adams suggests we should remand so that the trial court can decide whether to impose the former \$200 minimum fine authorized by former section 1202.4, subdivision (b)(1), despite the “strong possibility that the trial court will again use the permissive formula in subdivision (b)(2).” We see no reason to remand since the trial court indisputably exercised its discretion to use the minimum statutory fine as a multiplier under section 1202.4, subdivision (b). Accordingly, we shall order the restitution fine modified to \$1,600.

II. Criminal Justice Administration Fee

Adams contends the trial court erred when it imposed a \$196.33 criminal justice administration fee pursuant to Government Code section 29550.2 (hereinafter section 29550.2), subdivision (a).² He asserts this fee applies only to persons who are “booked into” a county jail pursuant to an arrest, and that his transfer from prison in Nebraska to the Humboldt County jail “is not an arrest and booking” for purposes of section 29550.2. This claim was forfeited by Adams’ failure to object to the fee at sentencing. “As we have observed on numerous occasions, ‘ “a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’ ” ’ [Citation.]

²In relevant part, section 29550.2 provides: “(a) Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c), including applicable overhead costs as permitted by federal Circular A 87 standards, incurred in booking or otherwise processing arrested persons. If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee.

(b) All fees collected by a county as provided in this section and Section 29550, may be deposited into a special fund in that county which shall be used exclusively for the operation, maintenance, and construction of county jail facilities.”

‘Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.’ [Citation.] ‘ “The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. . . .” ’ Additionally, ‘[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.’ ” (*People v. McCullough* (2013) 56 Cal.4th 589, 593, 597 [defendant’s failure to object in trial court forfeited argument that there was no evidence of his ability to pay booking fee].)

We are also unpersuaded by Adams’ claim that his attorney’s failure to object to the booking fee on the ground that he lacked the ability to pay it constituted ineffective assistance of counsel. To establish constitutionally inadequate representation, Adams must show both deficient representation and a reasonable probability that he would have obtained a better result but for counsel’s failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 696.) He cannot do so. While there is no dispute but that defendant is a man of few means, the court could reasonably have expected him to satisfy this fine from prison wages (see § 2700) or through employment upon his eventual release. (See *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486–1487 [court may consider a defendant’s ability to pay in the future]; *People v. Staley* (1992) 10 Cal.App.4th 782, 785 [“Ability to pay does not necessarily require existing employment or cash on hand”].) Moreover, Adams’ limited financial circumstances were described in the probation report provided to the court, so there is little likelihood that an objection on grounds of inability to pay based on the same information would have produced a different result.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment reflecting a restitution fine of \$1,600 and to forward a certified copy of the corrected abstract to the California Department of Corrections. The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.